

Supreme Court of the United States

October Term, 1942

WILLIAM J. MURPHY, ALAN W. BARTHOLOMEW,
JAMES A. CHAMBERLAIN and RUSSELL FRANK

Plaintiffs,

v.

Grange Association, an Illinois Partnership,

Respondent.

In Writ Of Certiorari

From The United States Court Of Appeals
For The Ninth Circuit

WILLIAM J. MURPHY, ALAN W. BARTHOLOMEW,
JAMES A. CHAMBERLAIN and RUSSELL FRANK
Plaintiffs, v. Grange Association, an Illinois Partnership,
Respondent.

JAMES F. KIRBY

General Counsel

WILLIAM J. FOLEY, JR.

General Counsel

Grange Association & Merchants

2000 Vermont Building St. N.W.

Washington, D.C. 20007

Phone 422-4100

Grange Association

General Counsel

Grange Association of Life Insurance

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	10
A. ERISA DOES NOT AUTHORIZE A PRIVATE RIGHT OF ACTION AGAINST NONFIDUCI- ARIES FOR KNOWING PARTICIPATION IN A FIDUCIARY BREACH	10
1. ERISA Expressly Limits Liability For Breaches Of Fiduciary Duties To Fiduci- aries And Co-Fiduciaries	10
2. The Text And Legislative History Of ER- ISA Preclude The Incorporation Of Com- mon Law Trust Principles To Create A Cause Of Action Against Nonfiduciaries Which Was Not Expressly Included In The Statute	12
3. ERISA Section 502(a)(3) Does Not Au- thorize A Private Cause Of Action Against Nonfiduciaries For Knowing Participation In A Fiduciary Breach	18
B. EVEN IF ERISA SECTION 502(a)(3) WERE TO BE CONSTRUED TO AUTHORIZE A CLAIM AGAINST NONFIDUCIARIES FOR KNOWING PARTICIPATION IN A FIDU- CIARY BREACH, IT WOULD NOT PERMIT MONEY DAMAGES	20
C. ERISA SECTION 502(l) PROVIDES NO SUP- PORT FOR ALLOWING A PRIVATE RIGHT OF ACTION AGAINST NONFIDUCIARIES FOR KNOWING PARTICIPATION IN A FIDU- CIARY BREACH	23
CONCLUSION	26
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Page
<i>American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assur. Soc'y of the United States</i> , 841 F.2d 658 (5th Cir. 1988) ..	3
<i>Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.</i> , 729 F. Supp. 1162 (N.D. Ill. 1989), <i>aff'd</i> , 941 F.2d 561 (7th Cir. 1991), <i>cert. denied</i> , 112 S. Ct. 1182 (1992)	3
<i>Austin v. General Am. Life Ins. Co.</i> , 498 F. Supp. 844 (N.D. Ala. 1980)	3
<i>Baker v. Big Star Div. of Grand Union Co.</i> , 893 F.2d 288 (11th Cir. 1989)	3
<i>Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry</i> , 110 S. Ct. 1339 (1990)	20-21
<i>Consolidated Beef Inds., Inc. v. New York Life Ins. Co.</i> , 949 F.2d 960 (8th Cir. 1991), <i>cert. denied</i> , 112 S. Ct. 1670 (1992)	3
<i>Consumer Product Safety Comm'n v. GTE Sylvania, Inc.</i> , 447 U.S. 102 (1980)	10
<i>Estate of Cowart v. Nicklos Drilling Co.</i> , 112 S. Ct. 2589 (1992)	11
<i>Davis v. Passman</i> , 442 U.S. 228 (1979)	8,19
<i>Diduck v. Kaszycki & Sons Contractors, Inc.</i> , 974 F.2d 270 (2d Cir. 1992)	17
<i>Drinkwater v. Metropolitan Life Ins. Co.</i> , 846 F.2d 821 (1st Cir.), <i>cert. denied</i> , 488 U.S. 909 (1988)	22
<i>Fechter v. Connecticut Gen. Life Ins. Co.</i> , 800 F. Supp. 182 (E.D. Pa. 1992)	3
<i>Firestone Tire & Rubber Co. v. Bruch</i> , 489 U.S. 101 (1989)	7,12

Table of Authorities Continued

	Page
<i>First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc.</i> , 960 F.2d 1546 (11th Cir. 1992), <i>petition for cert. filed</i> , 61 U.S.L.W. 3371 (Oct. 28, 1992)	21
<i>Flacche v. Sun Life Assur. Co. of Canada</i> , 958 F.2d 730 (6th Cir. 1992)	3
<i>Harsch v. Eisenberg</i> , 956 F.2d 651 (7th Cir.), <i>cert. denied sub nom. Bihler v. Eisenberg</i> , 113 S. Ct. 61 (1992)	22
<i>Mackey v. Lanier Collection Agency</i> , 486 U.S. 825 (1988)	25
<i>Massachusetts Mut. Life Ins. Co. v. Russell</i> , 473 U.S. 134 (1985)	<i>passim</i>
<i>Mertens v. Hewitt Associates</i> , 948 F.2d 607 (9th Cir. 1991), <i>cert. granted</i> , 113 S. Ct. 49 (1992)	21,24
<i>Munoz v. Prudential Ins. Co.</i> , 633 F. Supp. 564 (D. Colo. 1986)	3
<i>Nieto v. Ecker</i> , 845 F.2d 868 (9th Cir. 1988)	18,19,25
<i>Novak v. Andersen Corp.</i> , 962 F.2d 757 (8th Cir. 1992), <i>pet. for cert. filed</i> , 61 U.S.L.W. 3156 (Aug. 26, 1992)	21
<i>Pilot Life Ins. Co. v. Dedeaux</i> , 481 U.S. 41 (1987)	13,16
<i>Powell v. Chesapeake & Potomac Tel. Co.</i> , 780 F.2d 419 (4th Cir. 1985), <i>cert. denied</i> , 476 U.S. 1170 (1986)	22
<i>Protos v. Volkswagen of America, Inc.</i> , 797 F.2d 129 (3d Cir.), <i>cert. denied</i> , 479 U.S. 972 (1986)	23
<i>SEC v. Capital Gains Research Bureau, Inc.</i> , 375 U.S. 180 (1963)	24
<i>Schulist v. Blue Cross</i> , 717 F.2d 1127 (7th Cir. 1983)	3

Table of Authorities Continued

	Page
<i>Sokol v. Bernstein</i> , 803 F.2d 532 (9th Cir. 1986) ..	21
<i>Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.</i> , 793 F.2d 1456 (5th Cir. 1986)	22
<i>Trautvetter v. Quick</i> , 916 F.2d 1140 (7th Cir. 1990)	23
<i>Trustees of Laborers' Local 72 Pension Fund v. Nationwide Life Ins. Co.</i> , 783 F. Supp. 899 (D.N.J. 1992)	3
<i>Union Bank v. Wolas</i> , 112 S. Ct. 527 (1991)	11
<i>United States v. Burke</i> , 112 S. Ct. 1867 (1992)	23
<i>Useden v. Acker</i> , 947 F.2d 1563 (11th Cir. 1991), pet. for cert. filed, 60 U.S.L.W. 3843 (June 1, 1992)	3,7,12-13,14-16,19

STATUTES

18 U.S.C. § 664	16
ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A)	4-5,14
ERISA § 103, 29 U.S.C. § 1023	15
ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114	14
ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1)	15
ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2)	15
ERISA § 403(b)(1), 29 U.S.C. § 1103(b)(1)	15
ERISA § 403(b)(2), 29 U.S.C. § 1103(b)(2)	15
ERISA § 405, 29 U.S.C. § 1105	11,18
ERISA § 405(a), 29 U.S.C. § 1105(a)	11
ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1)	14
ERISA § 408(b)(4), 29 U.S.C. § 1108(b)(4)	15
ERISA § 408(b)(5), 29 U.S.C. § 1108(b)(5)	15
ERISA § 408(b)(6), 29 U.S.C. § 1108(b)(6)	15
ERISA § 408(b)(8), 29 U.S.C. § 1108(b)(8)	15

Table of Authorities Continued

	Page
ERISA § 409, 29 U.S.C. § 1109	8,11,18
ERISA § 409(a), 29 U.S.C. § 1109(a)	11,19,23
ERISA § 410, 29 U.S.C. § 1110	16
ERISA § 412, 29 U.S.C. § 1112	16
ERISA § 501, 29 U.S.C. § 1131	16
ERISA § 502(a), 29 U.S.C. § 1132(a)	19
ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) ...	12
ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2)	9,26
ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)	passim
ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B) ...	19
ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5)	24,26
ERISA § 502(a)(6), 29 U.S.C. § 1132(a)(6)	9,24
ERISA § 502(l), 29 U.S.C. § 1132(l)	8,9,23,25-26
ERISA § 502(l)(1), 29 U.S.C. § 1132(l)(1)	23
ERISA § 502(l)(2), 29 U.S.C. § 1132(l)(2)	24
ERISA § 502(l)(2)(B), 29 U.S.C. § 1132(l)(2)(B)	24
ERISA § 510, 29 U.S.C. § 1140	16
ERISA § 511, 29 U.S.C. § 1141	16
ERISA §§ 4001-4071, 29 U.S.C. §§ 1301-1371	16
42 U.S.C. § 2000e-5(g)	23

LEGISLATIVE HISTORY

120 Cong. Rec. 29932 (daily ed. Aug. 22, 1974) (remarks of Senator Williams), reprinted in 3 <i>Legislative History of the Employee Retirement Income Security Act of 1974</i> at 4743	5
120 Cong. Rec. 29957 (daily ed. Aug. 22, 1974) (remarks of Senator Ribicoff), reprinted in 3 <i>Legislative History of the Employee Retirement Income Security Act of 1974</i> at 4823.	5

Table of Authorities Continued

	Page
H.R. Rep. No. 779, 93d Cong., 2d Sess. 15 (1974), <i>reprinted in 2 Legislative History of the Em- ployee Retirement Income Security Act of 1974</i> at 2604	10
H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974), <i>reprinted in 2 Legislative History of the Em- ployee Retirement Income Security Act of 1974</i> at 3115, 3212-14	6
H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), <i>reprinted in 3 Legislative History of the Employee Retirement Income Security Act of 1974</i> 4277, 4590	5-6
S. Rep. No. 383, 93d Cong., 1st Sess. (1973), <i>re- printed in 1 Legislative History of the Em- ployee Retirement Income Security Act of 1974</i> at 1091-92, 1136	6
S. Rep. No. 383, 93d Cong., 1st Sess. (1973), <i>re- printed in 1 Legislative History of the Em- ployee Retirement Income Security Act of 1974</i> at 4890	22
H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6)(A), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989)	25
H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. <i>reprinted in 1989 U.S.C.C.A.N.</i> at 3018	25

OTHER AUTHORITIES

1 John N. Pomeroy, <i>Equity Jurisprudence</i> § 181 (Symons ed., 5th ed. 1941)	20
Restatement (Second) of Trusts § 222 (1959)	16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1671

WILLIAM J. MERTENS, ALEX W. BANDROWSKI,
JAMES A. CLARKE, and RUSSELL FRANZ,
Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,
Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF AMICUS CURIAE
AMERICAN COUNCIL OF LIFE INSURANCE
SUPPORTING RESPONDENT**

INTEREST OF THE AMICUS CURIAE*

The American Council of Life Insurance (the "Council") is a national trade association representing 616 life insurance companies which, in the aggregate, have approximately 94% of the assets of all United

* Petitioners and Respondent have consented to the filing of this brief. Copies of the parties' consent letters have been filed with the Clerk.

States life insurance companies and 98% of the insured pension business. Together, these companies play a major role in the operation of the nation's employee benefit system through the offer and sale of pension, health, and life insurance products and services to employee benefit plans. As of 1991, the Council estimates that life insurance companies held \$590 billion under contracts for the funding and payment of pension and welfare benefits in connection with employee benefit plans covering over 140 million participants and beneficiaries. In addition to providing products for the funding and payment of benefits, life insurance companies perform a wide range of important services for employee benefit plans including, but not limited to, providing actuarial advice and performing actuarial calculations, advising and assisting plans in the preparation of plan documents and reports, and performing discretionary or ministerial services in connection with the administration and processing of benefit claims. Accordingly, the Council has a significant interest in the outcome of this case and can demonstrate the extremely broad and adverse effects that the creation of an ERISA cause of action for damages against nonfiduciaries will have on the provision of products and services vital to employee benefit plans.

Life insurance companies offer products and provide services and professional advice to employee benefit plans in a myriad of circumstances in which they act in a nonfiduciary capacity. Thus, for example, courts have recognized that an insurer is not acting in a fiduciary capacity in offering its life, health, or annuity policies for sale to employee benefit plans when it exercises no discretionary authority or control

over a plan's decision as to whether or not to purchase the policy.¹ Likewise, courts have recognized that an insurer is not acting as a fiduciary when it performs actuarial, claims or benefit administration, and other services for an employee benefit plan in an advisory or ministerial capacity without any power to make final decisions on behalf of a plan (*e.g.*, when it renders actuarial advice to a plan which a plan fiduciary is free to accept or reject; when it disburses benefits at the direction of or subject to policies established by a plan fiduciary).²

The theory of nonfiduciary liability, which the Petitioners in this case have advanced and which some circuit courts of appeal have adopted, would make every life insurance company and every other prov-

¹ See, *e.g.*, *Flacche v. Sun Life Assur. Co. of Canada*, 958 F.2d 730, 734-35 (6th Cir. 1992); *Consolidated Beef Inds., Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 965 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992); *American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assur. Soc'y of the United States*, 841 F.2d 658, 664 (5th Cir. 1988); *Schulist v. Blue Cross*, 717 F.2d 1127, 1130-32 (7th Cir. 1983); *Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 729 F. Supp. 1162, 1185-91 (N.D. Ill. 1989), *aff'd*, 941 F.2d 561 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1182 (1992); *Austin v. General Am. Life Ins. Co.*, 498 F. Supp. 844, 846 (N.D. Ala. 1980).

² See, *e.g.*, *Flacche*, 958 F.2d at 734-35; *Baker v. Big Star Div. of Grand Union Co.*, 893 F.2d 288, 289-90 (11th Cir. 1989); *Trustees of Laborers' Local 72 Pension Fund v. Nationwide Life Ins. Co.*, 783 F. Supp. 899, 908 (D.N.J. 1992); *Home Life Ins. Co.*, 729 F. Supp. at 1185-91; *Munoz v. Prudential Ins. Co.*, 633 F. Supp. 564, 567-68 (D. Colo. 1986); see also *Useden v. Acker*, 947 F.2d 1563, 1575-76 (11th Cir. 1991), *pet. for cert. filed* 60 U.S.L.W. 3843 (June 1, 1992); *Schulist*, 717 F.2d at 1130-32; *Fechter v. Connecticut Gen. Life Ins. Co.*, 800 F. Supp. 182, 202-08 (E.D. Pa. 1992).

ider of products and services to employee benefit plans a potential defendant in any instance in which a plan fiduciary is alleged to have breached its fiduciary duties in purchasing their products, in acting on their professional advice, or in directing the performance of their administrative services. Moreover, they would be liable for monetary damages to exactly the same extent as the plan fiduciary (or fiduciaries) on whose breach of duties their liability would be based, notwithstanding the fact that they owed no similar duties of their own to such plans. The Council submits that such an extreme hazard of doing business with employee benefit plans, which must inevitably and adversely affect the availability and cost to them of important products and services, should only be imposed under ERISA as the result of a deliberate congressional policy decision clearly evidenced in the text and legislative history of that statute. As demonstrated below, no such evidence exists.

SUMMARY OF THE ARGUMENT

This case provides an occasion for the Court to consider whether ERISA authorizes a cause of action to recover monetary damages from a nonfiduciary who is alleged to have knowingly participated in an ERISA fiduciary's breach of its fiduciary duties. In order to protect the financial integrity of employee benefit plans and the interests of their participants and beneficiaries, ERISA broadly imposes fiduciary status on those persons who exercise discretionary authority or control with respect to the administration and management of such plans and their assets. ERISA §

3(21)(A), 29 U.S.C. § 1002(21)(A).³ Those persons who are defined as fiduciaries under ERISA are subject to a detailed and comprehensive scheme of regulation which imposes upon fiduciaries rigorous duties and standards of conduct, specifically establishes their liability for breaches of duty, and prescribes the remedies which are available in the event of such breaches. ERISA's integrated civil enforcement provisions, in turn, specify which parties are authorized to bring suit to redress breaches of fiduciary duties. Nowhere in this detailed scheme of fiduciary duties, liability, and accountability is any express provision made to extend liability for breaches of fiduciary duties to persons other than fiduciaries.

The legislative history of ERISA demonstrates that Congress was fully cognizant of the fact that plan fiduciaries in carrying out their responsibilities to administer employee benefit plans would need to avail themselves of the products, services, and professional advice of numerous other parties who would interact with such plans in a nonfiduciary capacity.⁴ Neither

³ See also 120 Cong. Rec. 29932 (daily ed. Aug. 22, 1974) ("the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets") (remarks of Senator Williams), *reprinted in 3 Legislative History of the Employee Retirement Income Security Act of 1974* at 4743; 120 Cong. Rec. 29957 (daily ed. Aug. 22, 1974) ("In addition, frequently the pension funds themselves are abused by those responsible for their management who manipulate them for their own purposes or make poor investments with them") (remarks of Senator Ribicoff), *reprinted in 3 Legislative History of the Employee Retirement Income Security Act of 1974* at 4823.

⁴ See, e.g., H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in 3 Legislative History of the Employee Retirement*

the text nor the legislative history of the statute, however, evidence any intent to establish liability for those parties in connection with a fiduciary's breach of duties or to hold them accountable to the same extent as a fiduciary for monetary damages as a remedy for such breaches.

In the absence of any express provision in ERISA for a cause of action against a nonfiduciary to recover monetary damages, Petitioners in this case argue that such a cause of action should be implied in the statute or added as a matter of federal common law. Petitioners assert that this cause of action was available under the common law of trusts and can be either implied in ERISA under section 502(a)(3), which provides plan participants and beneficiaries with the right to secure "appropriate equitable relief" as a remedy for ERISA violations, or added to the statute in order to accomplish ERISA's purposes. Petitioners' position is inconsistent with a fair evaluation of congressional intent, this Court's precedents, and applicable rules of statutory construction.

While this Court has noted that certain terms used in ERISA should be interpreted with reference to the common law of trusts and has authorized the adoption of common law trust principles to fill gaps left in the

Income Security Act of 1974 4277, 4590 (discussing "the ordinary functions of consultants and advisers to employee benefit plans"); H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974), reprinted in 2 *Legislative History of the Employee Retirement Income Security Act of 1974* 3115, 3212-14 (discussing "actuaries who perform services for qualified pension plans"). See also S. Rep. No. 383, 93d Cong., 1st Sess. (1973), reprinted in 1 *Legislative History of the Employee Retirement Income Security Act of 1974* at 1091-92, 1136.

statute,⁵ it has made it clear that the courts' freedom to engage in interstitial lawmaking under ERISA is limited to those areas in which there is clear evidence that an omission was the result of congressional inadvertence or of a conscious decision to leave a matter to the courts to resolve through the development of federal common law.⁶ The text and legislative history of ERISA provide no evidence that either was the case with respect to the omission of a cause of action against nonfiduciaries to recover monetary damages. Given the detail with which Congress has set forth the liability of fiduciaries for breach of fiduciary duty and the remedies available in the event of such breaches, it would be unreasonable to infer that in declining to provide for parallel liabilities and remedies with respect to nonfiduciaries "Congress's silence is accidental in an area where Congress has already said so much out loud." *Useden v. Acker*, 947 F.2d 1563, 1582 (11th Cir. 1991), *pet. for cert. filed*, 60 U.S.L.W. 3843 (June 1, 1992).

The argument that a cause of action for monetary damages against a nonfiduciary may be implied from the provision in section 502(a)(3) that participants may "obtain other appropriate equitable relief" to redress violations of ERISA is untenable. It is well settled that compensatory damages are a classic form of legal, not equitable relief, and the great majority of courts which have interpreted section 502(a)(3) have held that the language of that section does not en-

⁵ See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989).

⁶ See *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

compass the award of money damages. In those situations in which Congress intended to authorize the award of monetary damages for violations of ERISA, it made its intention clear in plain and unmistakable language. More fundamentally, as this Court has recognized, "the question [of] whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis v. Passman*, 442 U.S. 228, 239 (1979). Thus, answering the question of whether section 502(a)(3) authorizes monetary damages as a form of equitable remedy does not answer the question of against whom such remedy may be enforced and under what circumstances. Section 409 explicitly limits liability for breaches of fiduciary duties to fiduciaries. Section 502(a)(3) merely provides for the enforcement of rights and liabilities created elsewhere in the statute and cannot be fairly read to impose liabilities on nonfiduciaries where none otherwise exist.

The addition to ERISA in 1989 of section 502(l), which gives the Secretary of Labor the power to assess civil penalties against fiduciaries who breach their fiduciary duties and other persons who participate in an ERISA fiduciary breach, provides no evidence whatsoever of a congressional intent to authorize a private cause of action to recover monetary damages from nonfiduciaries. Indeed, a proposed amendment to create such a cause of action and to specifically overrule the decision upon which the Ninth Circuit's ruling in this case was based, was deleted from the same legislation in which section 502(l) was included. Petitioners and their *amici* assert that section 502(l) reflects a congressional "confirmation" that ERISA

as enacted authorizes a private right of action against nonfiduciaries for monetary damages, arguing that civil penalties could not be recovered under that section unless the Secretary of Labor had the right to recover monetary damages from nonfiduciaries as a form of equitable relief under other remedial provisions of ERISA. That argument is totally without merit. Section 502(l) does not amend any other provision in ERISA (other than empowering the Secretary in section 502(a)(6) to bring such a penalty action) or alter the plain meaning of the term "appropriate equitable relief." If Congress provided no indication of any intent to authorize a cause of action against nonfiduciaries or to authorize the recovery of monetary damages as a form of "appropriate equitable relief" when it enacted ERISA, the subsequent failure of Congress to amend that statute to specifically provide such authority likewise offers none. Moreover, even if Congress in adopting section 502(l) had acted on the basis of an opinion that ERISA already provided a right of action for monetary damages against nonfiduciaries, any opinion attributed to a Congress fifteen years after ERISA's enactment cannot be considered evidence of congressional intent in 1974.

Petitioners' last resort is to argue that employee benefit plans may be denied full relief if they are unable to seek a recovery of monetary damages against nonfiduciaries who are alleged to have participated in a fiduciary breach. They assert that Congress could not have intended in enacting ERISA to have denied employee benefit plans an important protection that was available under the common law of trusts. The best evidence of congressional intent, however, is the text of the statute and its legislative

history, which simply do not support Petitioners' argument. The legislative history of ERISA reflects a congressional intent to "strike a balance between providing meaningful reform and keeping costs within reasonable limits."⁷ While a cause of action against nonfiduciaries undoubtedly would provide employee benefit plans with additional sources of recovery in the event of fiduciary breaches, it would at the same time adversely affect the availability and cost to such plans of essential products and services provided to them by countless parties who act in a nonfiduciary capacity. Particularly in view of the significant extent to which ERISA improves upon the overall protections formerly afforded to employee benefit plans and their participants, Petitioners' policy arguments are a totally inadequate basis for incorporating in ERISA a particular common law cause of action which Congress declined to expressly include.

ARGUMENT

A. ERISA DOES NOT AUTHORIZE A PRIVATE RIGHT OF ACTION AGAINST NONFIDUCIARIES FOR KNOWING PARTICIPATION IN A FIDUCIARY BREACH

1. ERISA Expressly Limits Liability For Breaches Of Fiduciary Duties To Fiduciaries And Co-Fiduciaries

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). ERISA's statutory text is clear regarding

⁷ H.R. Rep. No. 779, 93d Cong., 2d Sess. 15 (1974), reprinted in 2 *Legislative History of the Employee Retirement Income Security Act of 1974* at 2604.

the liability of nonfiduciaries in connection with breaches of fiduciary duties—none is provided.⁸ ERISA sections 409 and 405, the only provisions in the statute that establish liability for breach of fiduciary duty, expressly limit such liability to "any person who is a fiduciary" who breaches his fiduciary duties⁹ and co-fiduciaries who are expressly made liable for the breach of another fiduciary under certain circumstances, including their knowing participation in such breach.¹⁰

In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), this Court refused to create a cause of action which would have allowed "an entirely new class of relief" for fiduciary breach not specified in section 409(a). 473 U.S. at 141 (emphasis original) (citations omitted). In light of "ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a comprehensive and reticulated statute," *id.* at 146 (quoting *Nachman Corp v. PBGC*, 446 U.S. 359, 361 (1980)), this Court reasoned "that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* (emphasis original). Accordingly, where Congress has expressly authorized relief for breach of fiduciary duty only against any person who is a

⁸ Because ERISA's text is clear, the burden on a party proposing a statutory interpretation at odds with the text is "*exceptionally heavy*." *Union Bank v. Wolas*, 112 S. Ct. 527, 530 (1991) (emphasis added). See also *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2593 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished").

⁹ 29 U.S.C. § 1109(a).

¹⁰ *Id.* at § 1105(a).

fiduciary, a congressional intent to authorize such relief against an entirely different class of persons cannot be implied.

2. The Text And Legislative History Of ERISA Preclude The Incorporation Of Common Law Trust Principles To Create A Cause Of Action Against Nonfiduciaries Which Was Not Expressly Included In The Statute

Recognizing that ERISA does not expressly authorize relief against nonfiduciaries for participation in a fiduciary breach, Petitioners and their *amici* posit that such relief should be incorporated into the statute or implied because such relief was available under the common law of trusts. Incorporation of this relief from the common law is chiefly supported by reference to this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). In *Bruch*, the Court resolved the issue of the appropriate standard of review for a court to apply in actions under section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), challenging benefit eligibility determinations. 489 U.S. at 110-15. As ERISA sets forth no standard, this Court was "guided by principles of trust law" to impose a *de novo* standard of review. *Id.* The interstitial lawmaking required in *Bruch* by a gap in ERISA's provisions is a far cry from the Petitioners' request in this case that the Court create an entirely new claim which would impose liability for breach of fiduciary duty upon an entirely new class of persons. *Russell* bars such a result. The Eleventh Circuit in *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991), *pet. for cert. filed*, 60 U.S.L.W. 3843 (June 1, 1992), put it aptly in stating that such a claim would "ignore the obvious care with which ERISA's remedial provisions are formu-

lated, instead requiring us to supplement the statute with a substantive right against a party that Congress readily could have chosen to reach." 947 F.2d at 1581.

The lessons of this Court's decisions make clear that it is not to be easily presumed that rights, liabilities, and remedies not expressly authorized under ERISA were omitted through inadvertence or an intent to leave the matter to the courts' development of federal common law. See *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (quoting *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 19 (1979) ("[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.")); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argues strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive."). Time and again the Court has emphasized the comprehensive and integrated nature of ERISA. Here, the plain text of ERISA, the structure of the entire statute, and its legislative history all require the conclusion that there is no gap in the fabric of the statute that permits the incorporation or implication of a cause of action for monetary damages against a nonfiduciary for participation in a fiduciary breach. Those decisions that have concluded otherwise¹¹ fail to give the appropriate deference to "an enforcement scheme

¹¹ Decisions implying a private right of action against nonfiduciaries for participating in a fiduciary breach were either decided before *Russell* or rely principally upon precedent decided before *Russell*.

crafted with such evident care as the one in ERISA.” *Russell*, 473 U.S. at 147.

To presume that Congress inadvertently omitted to authorize a cause of action against an entire class of persons for participation in a fiduciary breach would disregard ERISA’s comprehensive treatment of fiduciary responsibility in Part 4 of Title I, 29 U.S.C. §§ 1101-1114, including provisions specifying who may be held liable for breach of fiduciary duty and the relief which is available from such parties. Of particular note is the fact that Congress saw the necessity of expressly providing in section 405 that liability for a breach of fiduciary duty extends not only to the fiduciary who committed the breach but also to a co-fiduciary if, among other circumstances “he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach.” 29 U.S.C. § 1105(a)(1). It must be assumed that if Congress intended to create a parallel liability for nonfiduciaries, it would have acted with the same specificity.

Congress, moreover, sought to assure the efficacy of ERISA’s scheme of fiduciary responsibility and accountability by broadly defining the term “fiduciary” to include any persons who exercise or possess discretionary authority or control over the management and administration of employee benefit plans or plan assets. ERISA § (3)(21)(A), 29 U.S.C. § 1002(21)(A). Yet, at the same time, the statute and its legislative history reflect that “Congress clearly contemplated the involvement of non-fiduciary parties with employee benefit plans when it drafted . . . ERISA.”

Useden, 947 F.2d at 1581.¹² Thus, it was recognized that countless parties would offer and provide essential products and services to employee benefit plans or engage in transactions with plans under circumstances where they would neither be expected nor required to exercise discretionary authority or control on behalf of such plans, but would act on their own behalf or in a purely advisory or ministerial capacity. Precisely because such parties were expected to act on their own behalf or subject to the direction or discretion of others who were responsible for acting on behalf of the plan, they were not brought under the ERISA definition of “fiduciary” or made subject to ERISA fiduciary duties. Accordingly, to infer that Congress intended to hold nonfiduciaries equally accountable with fiduciaries for breaches of fiduciary duties would be totally inconsistent with this carefully drawn distinction made by Congress. The court in *Useden*, in rejecting such a result, properly recognized that “ERISA . . . embod[ies] a tailored law of trusts . . . which not only adopts familiar trust principles, but also supplements these principles with more exacting standards, and exempts from its reach certain

¹² For example, section 103 of ERISA requires statements from actuaries, accountants, and insurance companies. 29 U.S.C. § 1023. Additionally, exemptions or exceptions to the fiduciary responsibility provisions found in Part 4 were created for insurance contracts, ERISA §§ 401(b)(2), 403(b)(1), 408(b)(5) and (8), 29 U.S.C. §§ 1101(b)(2), 1103(b)(1), 1108(b)(5) and (8), and assets of an insurance company or assets of a plan held by an insurance company. ERISA § 403(b)(2), 29 U.S.C. § 1103(b)(2). Congress also recognized other such exceptions or exemptions under Part 4. *See, e.g.*, ERISA §§ 401(b)(1), 408(b)(4), (6), and (8), 29 U.S.C. § 1101(b)(1) (registered investment companies); 29 U.S.C. § 1108(b)(4), (6), and (8) (banks).

parties and activities that may have been amenable to suit under traditional trust law." *Id.* (emphasis original).¹³

Petitioners and their *amici* attempt to overcome the heavy weight of the evidence negating any congressional intent to authorize a cause of action under ERISA against nonfiduciaries by asserting that Congress could not have intended to have denied employee benefit plans important relief that was available under the common law of trusts, the absence of which would leave them with less protection than was available under the common law. Such an argument ignores the substantial overall degree to which ERISA has enhanced the relief available to employee benefit plans in the event that such plans are abused or mismanaged.¹⁴ Moreover, it overlooks the extent to which ERISA reflects a careful balancing of interests which should not be undermined. *Pilot Life*, 481 U.S. at 54. As this Court acknowledged in *Russell*, "Congress was concerned [in enacting ERISA] lest the cost of federal standards discourage the

¹³ On the other hand, Congress was readily capable of imposing liability on persons beyond "fiduciaries" when it wanted to create expanded liability. See ERISA §§ 501, 510, and 511, 29 U.S.C. §§ 1131, 1140, and 1141; 18 U.S.C. § 664.

¹⁴ For example, exculpatory clauses which the common law had allowed, see Restatement (Second) Of Trusts § 222 (1950), are invalidated by section 410 of ERISA, 29 U.S.C. § 1110, which in balancing the need for redress allows for certain forms of liability insurance. In addition, ERISA imposes bonding requirements upon plan fiduciaries. ERISA § 412, 29 U.S.C. § 1112. Finally, ERISA provides as a safety net a program of plan termination insurance administered by the Pension Benefit Guaranty Corporation. ERISA §§ 4001-4071, 29 U.S.C. §§ 1301-1371.

growth of private pension plans." *Russell*, 473 U.S. at 148 n.17 (citation omitted).

A cause of action against nonfiduciaries undoubtedly would provide employee benefit plans with additional sources of recovery in the event of fiduciary breaches. At the same time, however, such a cause would undoubtedly affect the availability and cost to employee benefit plans of essential products and services. It would expose the providers of services and products to potential litigation for monetary damages in all cases where plan fiduciaries were alleged to have breached fiduciary duties in purchasing their products, in acting on their professional advice, or in directing the performance of their administrative services.¹⁵ ERISA and its legislative history make it clear that such providers are generally not intended to be treated as fiduciaries under ERISA and are therefore relieved of any fiduciary duties or attendant liabilities in connection with their interaction with employee benefit plans. It would be particularly unreasonable to assume, then, that such persons were intended to be made subject to liability as the result of the violations of duties by others.

¹⁵ The Second Circuit has concluded that no intent to harm need be proven against the nonfiduciary and that a nonfiduciary's constructive knowledge of a fiduciary breach is established if a reasonably diligent investigation would have revealed the breach. *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 282-84 (2d Cir. 1992). Thus, at least under the Second Circuit's interpretation of this cause of action, no party can safely sell a product to a plan fiduciary or act at a plan fiduciary's direction in reliance on the belief that the fiduciary is acting consistently with its duties.

3. ERISA Section 502(a)(3) Does Not Authorize A Private Cause Of Action Against Nonfiduciaries For Knowing Participation In A Fiduciary Breach

In the absence of any express authorization of a cause of action against nonfiduciaries in those provisions of ERISA which specifically establish liability for breach of fiduciary duty (*i.e.*, sections 409 and 405), and in light of this Court's holding in *Russell* which precludes the incorporation or implication in those provisions of any relief not expressly authorized, Petitioners and their *amici* assert that such authorization can be implied in section 502(a)(3) which permits participants, beneficiaries, or fiduciaries to obtain "other appropriate equitable relief" to redress violations or enforce provisions of ERISA Title I. 29 U.S.C. § 1132(a)(3). Thus, they attempt to impose liability on nonfiduciaries for participation in a fiduciary breach through the remedial language of one of ERISA's enforcement provisions. Regardless of the particular remedies available as "other appropriate equitable relief" under section 502(a)(3), Petitioners' reliance on that provision is flawed at the outset. As recognized by the Ninth Circuit in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), whether the common law of trusts supplies a form of remedy for violation of ERISA's fiduciary standards is distinct from resorting to "the common law of trusts [to supply] a federal cause of action where the statute itself provides none." 845 F.2d at 872. The arguments of Petitioners and their *amici* ask the Court to disregard this distinction and read section 502(a)(3) as creating substantive obligations and liabilities nowhere expressed in ERISA.

However, the provisions of section 502(a) are merely "an integrated system of procedures for enforcement." See *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (citation omitted). They do not create causes of action of their own force and effect—rather they permit the enforcement of rights and liabilities grounded, in each instance, elsewhere in ERISA or in a covered employee benefit plan. Suits under section 502(a)(3) expressly require in the first instance a "violation" of either ERISA or the terms of a plan, but the statute on its face does not provide for nonfiduciary responsibility, or liability. Thus, Petitioners cannot rely upon section 502(a)(3) to avoid the clear import of the express omission of a nonfiduciary liability claim in ERISA's fiduciary responsibility provisions. See *Davis v. Passman*, 442 U.S. 228, 239 (1979) ("question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive"). Accordingly, ERISA does not in section 502(a)(3) have a statutory back door through which Petitioners may conveniently enter the federal courts when the front door is securely locked.

Moreover, because monetary and equitable relief is expressly available under fiduciary breach claims brought pursuant to sections 502(a) and 409(a), permitting recovery under subsection (a)(3) would render subsection (a)(2) superfluous, a result "contrary to a fundamental canon of statutory construction." *Nieto*, 845 F.2d at 873. Accord *Useden v. Acker*, 947 F.2d 1563, 1580 (11th Cir. 1991), *pet. for cert. filed*, 60 U.S.L.W. 3843 (June 1, 1992). Such an interpretation does not render, as *amicus* United States asserts, section 502(a)(3)(B) "essentially useless." Brief for

United States at 23-24. Section 502(a)(3) permits actions for equitable relief against fiduciaries, as well as against other persons, for breach of the terms of a plan or ERISA's numerous *nonfiduciary* provisions regarding matters such as reporting and disclosure, vesting and funding, and interference with protected rights. Affirmance of the Ninth Circuit's ruling clearly will not result in section 502(a)(3) being deprived of any "substantial purpose."

B. EVEN IF ERISA SECTION 502(a)(3) WERE TO BE CONSTRUED TO AUTHORIZE A CLAIM AGAINST NON-FIDUCIARIES FOR KNOWING PARTICIPATION IN A FIDUCIARY BREACH, IT WOULD NOT PERMIT MONEY DAMAGES

Petitioners argue that the relief they seek, which undeniably constitutes money damages, is authorized under ERISA section 502(a)(3)'s provision for appropriate equitable relief as "make whole" relief traditionally available in common law equity courts. Petitioners' Brief at 19. This argument springs from a misapplication of the "exclusive jurisdiction" of common law equity courts "over actions involving a trustee's breach of his fiduciary duties." *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 110 S. Ct. 1339, 1348 n.8 (1990). As a consequence of their exclusive jurisdiction, equity courts were able to establish purely legal rights and grant legal remedies in cases within their jurisdiction. 1 John N. Pomeroy, *Equity Jurisprudence* § 181 at 257 (Symons ed., 5th ed. 1941). Yet as this Court recognized in *Terry* (an action involving the question of right to a jury trial), the "nature of the relief" requested is "more important" than the jurisdiction of courts in equity. 110 S. Ct. at 1348 n.8. The Court concluded that since the employees sought money damages, they were entitled

to a jury trial. *Id.* at 1348-49.¹⁶ Under Petitioners' reasoning any form of legal or equitable relief would be available under Section 502(a)(3) because all such forms of relief were available in common law equity courts. Such was clearly not the intent of Congress. *Russell*, 473 U.S. at 148 ("In contrast to the repeatedly emphasized purpose to protect contractually defined benefits, there is a stark absence—in the statute itself and in its legislative history—of any reference to an intention to authorize the recovery of extra-contractual damages.") (footnotes omitted).

A vast majority of courts have rejected attempts to recover extra-contractual or monetary damages under section 502(a)(3). These courts have construed the word "equitable" to mean what it usually means—injunctive or declaratory relief." *Sokol v. Bernstein*, 803 F.2d 532, 538 (9th Cir. 1986). See *Novak v. Andersen Corp.*, 962 F.2d 757, 759 (8th Cir. 1992), *pet. for cert. filed*, 61 U.S.L.W. 3156 (Aug. 26, 1992) ("We do disagree . . . with [the] proposition that an award of monetary damages is equitable relief under ERISA."); *First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc.*, 960 F.2d 1546, 1553 (11th Cir. 1992) ("We must reject [the] argument that the phrase 'equitable relief' in § 1132(a)(3) authorizes an award of compensatory damages. The omission of any mention of a right to legal remedies in § 1132(a)(3) must be

¹⁶ The Court recognized that damages were equitable in nature only where they were "restitutionary" or were "incidental to or intertwined with" injunctive relief. 110 S. Ct. at 1348 (citations omitted). Here, Petitioners' claim for restitution was rejected below and Petitioners did not seek review of that dismissal in this Court. *Mertens v. Hewitt Associates*, 948 F.2d 607, 612 (9th Cir. 1991), *cert. granted*, 113 S. Ct. 49 (1992).

taken as an indication of Congress' intent to limit relief available under this section to that which is equitable in nature.") (footnote and citations omitted), *petition for cert. filed*, 61 U.S.L.W. 3371 (Oct. 28, 1992); *Harsch v. Eisenberg*, 956 F.2d 651, 656 (7th Cir.) ("Compensatory damages are a classic form of legal, not equitable, relief.") (emphasis original), *cert. denied sub nom. Bihler v. Eisenberg*, 113 S. Ct. 61 (1992); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824 (1st Cir.) ("Other appropriate equitable relief" should be interpreted to mean what it says—declaratory or injunctive relief, not compensatory and punitive damages."), *cert. denied*, 488 U.S. 909 (1988). See also *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1464 (5th Cir. 1986); *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).

Such interpretation is fully consistent with the report on ERISA of the Senate Finance Committee which reflects Congress' intent to give the term "appropriate equitable relief" its plain meaning:

Appropriate equitable relief may be granted in a civil action. For example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets Also, the bill specifically provides that a fiduciary may be removed through civil action brought by the Secretary of Labor, participants or beneficiaries

S. Rep. No. 383, 93d Cong., 2d Sess. at 105-06, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4989. It also accords with the fact that in other provisions of ERISA,

equitable relief is clearly distinguished from compensatory damages and other forms of remedial relief. See, e.g., ERISA § 409(a), 29 U.S.C. § 1109(a).

Finally, the exclusion of money damages from section 502(a)(3) is consistent with the interpretation of the term "equitable relief" in other federal statutes. The phrase "other equitable relief as the court deems appropriate" appeared in Title VII, 42 U.S.C. § 2000e-5(g) prior to the Civil Rights Act of 1991. Federal courts uniformly interpreted the phrase as not authorizing money damages. See, e.g., *Trautvetter v. Quick*, 916 F.2d 1140, 1147 (7th Cir. 1990); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986). This Court, moreover, as recently as this past Term recognized that "Title VII does not allow awards for compensatory or punitive damages." *United States v. Burke*, 112 S. Ct. 1867, 1873 (1992). Hence, the monetary damages sought by Petitioners in this case should not be available under section 502(a)(3) of ERISA.

C. ERISA SECTION 502(l) PROVIDES NO SUPPORT FOR ALLOWING A PRIVATE RIGHT OF ACTION AGAINST NONFIDUCIARIES FOR KNOWING PARTICIPATION IN A FIDUCIARY BREACH

Petitioners are not aided by section 502(l), the civil penalty action added to ERISA in 1989 which authorizes the Secretary of Labor to impose a fine upon fiduciaries who breach their fiduciary duties and other persons who knowingly participate in a fiduciary breach. 29 U.S.C. § 1132(l)(1). That provision, in defining the "applicable recovery amount" for purposes of calculating the 20% penalty, refers to amounts recovered from a fiduciary or other person in "proceedings instituted by the Secretary under subsection

(a)(2) or (a)(5) of [section 502].” *Id.* at § 1132(l)(2). Petitioners argue there would be no “recovery amount” upon which to base the 20% penalty if section 502(a)(5), which contains “other appropriate equitable relief” language similar to section 502(a)(3), did not authorize monetary damages. *See* Petitioners’ Brief at 15. Accordingly, Petitioners (and their *amici*) assert, section 502(l) “confirms” the original intent of Congress to authorize actions to recover money damages against nonfiduciaries for knowing participation in a fiduciary breach. *See* Brief for United States at 18; *see also* Petitioners’ Brief at 16.

As the Ninth Circuit recognized, however, section 502(l) “applies to the Secretary only, not to plan participants.” *Mertens v. Hewitt Associates*, 948 F.2d 607, 611 (9th Cir. 1991), *cert. granted*, 113 S. Ct. 49 (1992).¹⁷ Furthermore, an addition to ERISA in 1989 of a penalty action expressly limited to the Secretary of Labor is hardly a relevant basis for determining whether the omission of a cause of action by a Congress fifteen years earlier was deliberate. At the same time, even if Congress in adopting section 502(l) acted on the basis of an opinion that ERISA already provided a right of action for monetary damages against nonfiduciaries, any opinion attributed to a subsequent Congress acting fifteen years after ERISA’s original enactment cannot be considered evidence of Congress’ intent. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 199-200 (1963).

¹⁷ Congress amended section 502(a)(6) to empower the Secretary to enforce section 502(l), 29 U.S.C. § 1132(a)(6), and the “applicable recovery amount” is ascertained with respect to “judicial proceedings instituted by the Secretary.” ERISA § 502(l)(2)(B), 29 U.S.C. § 1132(l)(2)(B) (emphasis added).

Indeed, a proposed amendment to specifically create a cause of action for knowing participation in a fiduciary breach intended to overrule *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) was deleted from the same legislation in which section 502(l) was included. *See* H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6)(A), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989). Since the proper application of *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), requires the conclusion that Congress did not intend to authorize either a cause of action against nonfiduciaries or the recovery of monetary damages as a form of “appropriate equitable relief” when it created ERISA in 1974, the subsequent failure of Congress to amend the statute to specifically provide such authority can only bolster that conclusion. *Cf. Mackey v. Lanier Collection Agency*, 486 U.S. 825, 837 (1988) (“Once Congress was sufficiently aware of [an issue] . . . Congress’ decision to remain silent concerning [the issue] ‘acknowledged and accepted the practice, rather than prohibiting it.’”) (citation omitted).

In fact, the legislative history of section 502(l) reveals that it was simply a compromise substituted for the Senate’s desire to increase the premiums paid by plans to the Pension Benefit Guaranty Corporation. “In lieu of the premium increase, the conferees agreed to strengthen the Secretary of Labor’s authority to enforce ERISA by providing for a mandatory civil penalty for certain violations.” H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. *reprinted in* 1989 U.S.C.C.A.N. at 3018. It reflects no intent to provide participants or beneficiaries with a cause of action against nonfiduciaries. At most, it reflects that Congress was aware of some decisions that awarded

"amounts" to the Secretary under sections 502(a)(2) or (a)(5). Petitioners' argument would have the definition of the term "applicable recovery amount" in section 502(l) provide an entire cause of action in favor of private parties that is nowhere to be found in the statute's comprehensive substantive, or integrated enforcement, provisions. It should be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Of Counsel:

RICHARD E. BARNSBACK
STEPHEN W. KRAUS
PHILLIP E. STANO
AMERICAN COUNCIL OF
LIFE INSURANCE
1001 Pa. Ave., N.W.
Washington, D.C. 20004
(202) 624-2183

Respectfully submitted,

JAMES F. JORDEN

Counsel of Record

WALDEMAR J. PFLEPSSEN, JR.

STEPHEN H. GOLDBERG

JORDEN SCHULTE & BURCHETTE

1025 Thomas Jefferson Street, N.W.

Suite 400 East

Washington, D.C. 20007

(202) 965-8127

Counsel for Amicus Curiae

AMERICAN COUNCIL OF

LIFE INSURANCE

December 21, 1992

APPENDIX

APPENDIX

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), provides:

Definitions

* * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibilities to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

ERISA § 103, 29 U.S.C. § 1023, provides in relevant part:

Annual reports**(a) Publication and filing**

(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 1024(a) of this title, and shall be made available and furnished to participants in accordance with section 1024(b) of this title.

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include—

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

(2) If some or all of the information necessary to enable the administrator to comply with the requirements of this subchapter is maintained by—

(A) an insurance carrier or other organization which provides some or all of the benefits under the plan, or holds assets of the plan in a separate account,

(B) a bank or similar institution which holds some or all of the assets of the plan in a common or collective trust or a separate trust, or custodial account, or

(C) a plan sponsor as defined in section 1002(16)(B) of this title,

such carrier, organization, bank, institution, or plan sponsor shall transmit and certify the accuracy of such information to the administrator within 120 days after the end of the plan year (or such other date as may be prescribed under regulations of the Secretary).

(3)(A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

* * *

(4)(A) The administrator of an employee pension ben-

efit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section. In a case where a plan is not required to file an annual report, the requirement of this paragraph shall not apply, and, in a case where by reason of section 1024(a)(2) of this title, a plan is required only to file a simplified report, the Secretary may waive the requirement of this paragraph.

ERISA § 401, 29 U.S.C. § 1101, provides in relevant part:

Coverage

* * *

(b) For purposes of this part:

(1) In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such investment company.

(2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:

(A) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a State.

(B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the

amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

ERISA § 403, 29 U.S.C. § 1103, provides in relevant part:

Establishment of Trust

(a) Benefit plan assets to be held in trust; authority of trustees

* * *

(b) Exceptions

The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

* * *

ERISA § 405(a), 29 U.S.C. § 1105(a), provides:

Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

ERISA § 408, 29 U.S.C. § 1108, provides in relevant part:

Exemptions from prohibited transactions

* * *

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

* * *

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qual-

ified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such

bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

* * *

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company or an affiliate thereof) who has authority to manage and control the assets of the plan.

ERISA § 409(a), 29 U.S.C. § 1109(a), provides:

Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use

of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

ERISA § 410, 29 U.S.C. § 1110, provides:

Exculpatory provisions; insurance

(a) Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(b) Nothing in this subpart shall preclude—

(1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary;

(2) a fiduciary from purchasing insurance to cover liability under this part from and for his own account; or

(3) an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

ERISA § 412(a), 29 U.S.C. § 1112(a), provides:

Bonding

(a) Requisite bonding of plan officials

Every fiduciary of an employee benefit plan and every person who handles funds or other property of such

a plan (hereafter in this section referred to as "plan official") shall be bonded as provided in this section; except that—

(1) where such plan is one under which the only assets from which benefits are paid are the general assets of a union or of an employer, the administrator, officers, and employees of such plan shall be exempt from the bonding requirements of this section, and

(2) no bond shall be required of a fiduciary (or of any director, officer, or employee of such fiduciary) if such fiduciary

(A) is a corporation organized and doing business under the laws of the United States or of any State;

(B) is authorized under such laws to exercise trust powers or to conduct an insurance business;

(C) is subject to supervision or examination by Federal or State authority; and

(D) has at all times a combined capital and surplus in excess of such a minimum amount as may be established by regulations issued by the Secretary, which amount shall be at least \$1,000,000. Paragraph (2) shall apply to a bank or other financial institution which is authorized to exercise trust powers and the deposits of which are not insured by the Federal Deposit Insurance Corporation, only if such bank or institution meets bonding or similar requirements under State law which the Secretary determines are at least equivalent to those imposed on banks by Federal law.

The amount of such bond shall be fixed at the beginning of each fiscal year of the plan. Such amount shall be not less than 10 per centum of the amount of funds handled. In no case shall such bond be less than \$1,000 nor more than \$500,000, except that the

Secretary, after due notice and opportunity for hearing to all interested parties, and after consideration of the record, may prescribe an amount in excess of \$500,000, subject to the 10 per centum limitation of the preceding sentence. For purposes of fixing the amount of such bond, the amount of funds handled shall be determined by the funds handled by the person, group, or class to be covered by such bond and by their predecessor or predecessors, if any, during the preceding reporting year, or if the plan has no preceding reporting year, the amount of funds to be handled during the current reporting year by such person, group, or class, estimated as provided in regulations of the Secretary. Such bond shall provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of the plan official, directly or through connivance with others. Any bond shall have as surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to sections 9304-9308 of Title 31. Any bond shall be in a form or of a type approved by the Secretary, including individual bonds or schedule or blanket forms of bonds which cover a group or class.

ERISA § 501, 29 U.S.C. § 1131, provides:

Criminal penalties

Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than \$5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding \$100,000.

ERISA § 502(a), 29 U.S.C. § 1132(a), provides:

Civil Enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section.

ERISA § 502(l), 29 U.S.C. § 1132(l), provides:

(l) Civil penalties on violations by fiduciaries

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term “applicable recovery amount” means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary’s sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with

respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

ERISA § 510, 29 U.S.C. § 1140, provides:

Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

ERISA § 511, 29 U.S.C. § 1141, provides:

Coercive interference

It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.]. Any person who willfully violates this section shall be fined

18 U.S.C. § 664, provides:

Theft or embezzlement from employee benefit plan

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than \$10,000, or imprisoned not more than five years, or both.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974.